Supreme Court, U.S.
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No. 99-553

In the
SUPREME COURT OF THE UNITED STATES

THOMAS J. CORCORAN, ET AL.,

Petitioners,

v.

CROIXLAND PROPERTIES LIMITED PARTNERSHIP,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether issuance of a writ certiorari is appropriate when the only issue for review is whether a court of appeals properly applied local law.

B. Whether the United States Court of Appeals for the District of Columbia Circuit erred in its application of District of Columbia law in holding that the Complaint in this action met the pleading requirements for the "of or concerning" element of common law defamation in three independent ways.

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STATEMENT OF THE CASE

Croixland Properties Limited Partnership ("Croixland") is a Wisconsin limited partnership and the owner of a greyhound racing facility known as St. Croix Meadows, duly licensed by the Wisconsin Gaming Commission and located in the City of Hudson, Wisconsin. This facility was constructed at a cost of approximately $40 million. *Compl.*, ¶¶ 1, 7 (App. A19-A20).

On or about September 30, 1993, plaintiff and three poor, federally-recognized Indian tribes with reservations in rural northern Wisconsin -- the Sokaogon Chippewa Community (Mole Lake Band of Lake Superior Chippewa), Lac Corte Oreilles Band of Lake Superior Chippewa Indians and the Red Cliff Band of Lake Superior Chippewa Indians -- entered into agreements providing for the sale of the plaintiff's greyhound facility property to the tribes and the joint management and control of the combined greyhound racing facility/casino by an equal partnership known as the Four Feathers Casino Joint Venture comprised of the three tribes and an affiliate of plaintiff, Galaxy Gaming and Racing Limited Partnership. The agreements were contingent upon the Secretary of the Interior approving the establishment of an off-reservation casino at the property under 25 U.S.C. § 2719(b)(1)(A) of the Indian Gaming Regulatory Act ("IGRA"), and acquiring the land in trust for the benefit of the tribes under 25 U.S.C. § 465 of the Indian Regulatory Act ("IRA"). *Compl.*, ¶ 8 (App. A20-A21).

On October 12, 1993, the three tribes submitted an application to the Minnesota Area Office of the Bureau of Indian Affairs for approval of the proposed casino at the Hudson property owned by the plaintiff. *Compl.*, ¶ 10 (App. A21). On November 24, 1994, the Minnesota Area Director recommended that the Assistant Secretary - Indian Affairs in

Washington, D.C., approve the tribes' proposed Hudson casino. *Compl.*, ¶ 11 (App. A22).

Tribes that opposed the project for competitive reasons retained the defendants and others to attempt to cause Department of Interior officials in Washington, D.C. to reject the Minnesota Area Director's proposed recommendation and deny approval of the tribes' application for approval of the proposed Hudson casino. *Compl.*, ¶ 12 (App. A22).

As of April, 1995, the defendants believed, however, that their lobbying effort was not succeeding in influencing the Department of Interior. *Compl.*, ¶ 19 (App. A24). Beginning on or about this time and at various times thereafter, defendants and other persons conspired to attempt to cause the disapproval of the proposed Hudson casino by falsely stating that the owners of the Hudson greyhound facility were connected to organized crime. This was accomplished by directly stating that the owners were connected to organized crime or by stating that a company named Delaware North owned the Hudson greyhound facility, that Delaware North was connected to organized crime and that approval of the Hudson casino would allow organized crime to be directly involved in Indian gaming. As part of this strategy, defendants and other persons known and unknown agreed to distribute copies of an article from the November 17, 1994 edition of the *Wall Street Journal*, regarding Delaware North's alleged organized crime ties, which the defendants used to support their false statements that the owner of the Hudson greyhound facility has organized crime ties. *Compl.*, ¶¶ 20, 26 (App. A24-A25, A27).

In furtherance of the conspiracy, Scott Dacey, a lobbyist for the Oneida Indians of Wisconsin, met with

Deputy Assistant Secretary of Interior, Michael Anderson, on May 23, 1995, and gave him a copy of the *Wall Street Journal* article. *Compl.*, ¶ 22 (App. A25-A26). Mr. Anderson was the deciding official at the Department of Interior, the one who less than two months later denied the application. *Compl.*, ¶ 13. (App. A22-A23).

The defendants also wanted to enlist the press in their effort to smear the owner of the Hudson greyhound facility. Thus, in a strategy memorandum dated June 5, 1995, the defendant Larry Kitto included the following item:

> Get a story in the Washington Post about Delaware North and their relationship with the tracks in Wisconsin. TOM CORCORAN, LARRY KITTO, SCOTT DACY, AND JERRY SIKORSKI WILL PURSUE THIS.

Compl., ¶ 21 (App. A25).

In addition, the defendants sought to reach out to contacts on Capitol Hill. In another strategy memorandum prepared by either Corcoran or O'Donnell, they described their plan to meet with Senator John McCain:

> We want to see him because of <u>character</u> of Delaware North--possible mafia connection--Wall St. Journal article [sic] that's relevant--

> First time of any such real evidence of connections of such an element in Indian gaming.

Compl., ¶ 23 (App. A26).

In June of 1995, defendants Corcoran and O'Donnell met with Senator McCain and told him that "the owners of the Hudson greyhound facility are connected to organized crime" and requested Senator McCain's assistance in causing the denial of the proposed Hudson casino. *Compl.*, ¶ 26 (App. A27-A28).[1] According to a May 15, 1997 article from the *Minneapolis Star Tribune*, Senator McCain told Corcoran and O'Donnell that he would ask the Justice Department to look into the casino application. *Id.*

The Complaint alleges that the defendants agreed or understood that the purpose of their meetings, discussions and agreements was to utilize the strategy described above to cause the denial of the three tribes' application for approval of the Hudson casino, understood or should have understood that their method of achieving this purpose by defaming plaintiff was tortious and unlawful and would result in injury

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[1] Petitioners have asserted that paragraph 26 of the complaint alleges that Messrs. Corcoran and O'Donnell "falsely stated to Senator McCain that **a company named Delaware North was the owner of the Hudson greyhound facility and that Delaware North was connected to organized crime.**" *Petition* at 2-3 (emphasis in original). That is not correct. In describing the meeting with Senator McCain, paragraph 26 of the Complaint alleges that "defendants Corcoran and O'Donnell met with United States Senator John McCain and told him that the owners of the Hudson greyhound facility are connected to organized crime and requested Senator McCain's assistance in causing the denial of the proposed Hudson casino." *Compl.*, ¶ 26 (App. A27-A28).

to plaintiff, and agreed and understood that each would act in concert with others to achieve this purpose by defaming the plaintiff. *Compl.*, ¶ 24 (App. A26).

On July 14, 1995, the Deputy Assistant Secretary - Indian Affairs issued a letter denying the application. *Compl.*, ¶ 13 (App. A22-A23). Six days later, on July 20, 1995, defendants Corcoran and O'Donnell wrote to Senator McCain as follows:

> Dear John:
>
> As you will recall, last month we met with you regarding the proposed conversion of a dog track in Hudson, Wisconsin, to an Indian gaming casino which would bail out the dog track owner, Delaware North of Buffalo, New York. Enclosed is the announcement by BIA about their decision to deny this application.
>
> Many, many thanks to you for your help with the Department of Justice. Without your assistance, we do not believe the BIA headquarters would have overturned its Minneapolis area office on this matter.

Comp., ¶ 26 (App. A27-A28).

The Complaint alleges that defendants Corcoran and O'Donnell intended to injure Croixland in its business reputation and to cause the Department of Interior to deny approval of the proposed Hudson casino, and that they published the defamatory statement with actual knowledge that it was false, or with reckless disregard as to its truth or

falsity. *Compl.*, ¶¶ 29-30 (App. A28). The statement that the owners of the greyhound facility -- Croixland -- are connected to organized crime published by defendants Corcoran and O'Donnell is defamatory *per se*. *Compl.*, ¶ 31 (App. A28).

Finally, the Complaint alleges that the publication of the defamatory statement was a cause of the Department of Interior's decision to deny approval of the tribes' proposed Hudson casino which further damaged plaintiff. *Compl.*, ¶ 33 (App. A28-A29).

ARGUMENT

The petition for a writ of certiorari misstates the question presented, the complaint at issue, and the decision below. The court of appeals decision deals exclusively with the "of or concerning" element of common law defamation in the District of Columbia. That unanimous decision represents a black letter application of uncontroversial and long settled common law. Petitioners' assertion that the decision below represents a "complete departure from the accepted usual course of judicial proceedings in the District of Columbia," *Petition* at *i*, is wholly unsupportable. The court of appeals application of this element of common law defamation falls far short of the threshold of importance necessary to justify this Court's attention and resources.

I. THE COURT OF APPEALS APPLICATION OF DISTRICT OF COLUMBIA COMMON LAW DOES NOT SATISFY THIS COURT'S CRITERIA FOR GRANTING THE WRIT.

Petitioners assert that in this case issuance of a writ of certiorari is appropriate pursuant to Supreme Court Rule

10(a). This rule requires petitioners to demonstrate not only that the court of appeals erred, but that it "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). Initially, it must be noted that this conflicts squarely with petitioners' representation to the court of appeals that they would seek the writ on the basis that the court of appeals decision created a rift among the federal circuits.[2]

In any case, the petitioners' request that this Court grant a writ of certiorari for the purpose of ensuring that the court of appeals properly applied an element of District of Columbia tort law ignores the well established standards for the issuance of the writ. *See Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("standing alone, a challenge to state law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review"). Indeed, this Court has specifically noted that it "normally doe[es] not interfere" with courts of appeals decisions involving issues that "pertain solely to the local law of the District of Columbia." *United States v. Frady*, 456 U.S. 152, 159-160 (1982).

Petitioners proffer several cases they claim stand for the proposition that "[t]his Court has granted certiorari on numerous occasions where courts of appeals have issued decisions in conflict with, or refused to follow, decisions of state courts." *Petition* at 6. The foregoing incorporates two

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[2] This premise, advanced by petitioners in a brief in support of a motion to stay the court of appeals mandate, is inherently improbable. The court of appeals was applying local common law in a diversity case. The petitioners have never cited a decision from another circuit purporting to apply District of Columbia's law of defamation.

different scenarios. The first, that a court of appeals wrongly applied local law, is the one petitioners claim occurred in this case. The second, however, is the situation where a court of appeals refuses to apply local law, a scenario with absolutely no bearing on the instant case.

It is this second proposition that explains petitioners' citations. *Six Cos. v. Joint Highway Dist. No. 13*, 311 U.S. 180 (1940), *West v. AT&T*, 311 U.S. 223 (1940), and *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940), are all cases in which the court of appeals held that it was not bound by particular state law authority, thereby creating significant issues with regard to application of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). In the present case, there is no suggestion whatsoever that the court of appeals deemed itself free to decide the instant case without reference to local law.[3] Petitioners' claim is merely that the court of appeals erred in its application of local law. This is a wholly different, and less momentous issue than has traditionally merited this Court's attention.

In sum, petitioners fail to address the authority establishing that this Court will not intervene to correct a court of appeals application of state common law. Moreover, the authorities proffered do not remotely touch on petitioners' grievance, that the court of appeals applied local law in a manner inconsistent with petitioners' view of the local law. Consequently, petitioners' failures highlight the fact that the criticism they level at the court of appeals decision does not

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[3] On this score, petitioners' final proffered authority is *Exxon Co., USA v. Banque de Paris et des Pays Bas*, 488 U.S. 920 (1988). Petitioners fail to note that the order found at that citation merely remands the matter for further consideration in light of an *intervening state decision*, a circumstance wholly unrelated to the one at bar.

approach the level of legal importance so as to make certiorari appropriate.

II. THE UNANIMOUS DECISION BELOW CORRECTLY APPLIED DISTRICT OF COLUMBIA COMMON LAW.

Petitioners' contention that the court of appeals made some radical break with District of Columbia common law is incorrect. The court of appeals found three independent reasons why Croxland's Complaint survives a motion to dismiss.

1. "[T]he complaint alleged that the lobbyists linked Croixland to Delaware North and Delaware North to organized crime. Even if the lobbyists misidentified the owner of the facility, it did not remove the taint to the true owner." (App. A7).

2. "[T]he complaint alleged that Croixland was defamed because statements were made about 'the owner of the track' having connections to organized crime." (App. A7).

3. The complaint pled an alternative theory under Federal Rule of Civil Procedure 8(e), "namely that defamatory statements were made directly about Croixland without reference to Delaware North." (App. A8).

Consequently, in contrast to the petitioners' attack on what they construe as a single ground for the court of appeals reversal of the trial court, petitioners must demonstrate that *each* of the *three* grounds is a "complete departure from the accepted and usual course of judicial proceedings in the District of Columbia." *Petition* at *i*. Failing to acknowledge the three independent bases of the court of appeals decision, petitioners misharacterize this decision as "holding that a defamation claim exists even if a listener only understands the status of the allegedly defamed party (such as 'the owner') without there being any allegation that sufficient information was brought to the listeners attention so that he could reasonably identify the aggrieved party by name. *Petition* at 4.

Petitioners rely mainly on *Harmon v. Liss*, 116 A.2d 693 (D.C. 1955). This reliance is misplaced. First, *Harmon* was an appeal of a judgment notwithstanding the verdict and therefore cannot be understood to create a pleading standard as petitioners suggest. Second, nowhere does *Harmon* state that defamation is actionable only if the victim is identified "by name." Rather, *Harmon* stands for the well established proposition that "the person slandered need not be specifically named in the defamatory language as the surrounding circumstances may be such as to leave no doubt in the mind of the hearer as to his identity." *Id.* at 695.

The proposition that a plaintiff must allege that a listener derived the plaintiff's *name* from the circumstances of the defamation in order to meet *Harmon's* identification requirements is wholly unsupported. According to the petitioners' argument, a defamation claim cannot survive a motion to dismiss if on the face of the complaint it does not appear that the listener could name the victim -- no matter

how definitively the victim is otherwise identified, *e.g.*, by address, job title, photograph, or, as in the present case, by the victim's status as the owner of a precisely identified property. The rule that petitioners advocate is plainly contrary to the general rule. "It is not necessary that the plaintiff be designated by name; it is enough that there is such a description of or reference to him that those who hear or read reasonably understand the plaintiff to be the person intended." *Restatement (Second) Torts* § 564, *comment b* (1977). Thus, the issue is whether a party can be identified with sufficient certainty, not whether it can be determined by name.

The general rule, moreover, has previously been applied in the District of Columbia. For example, *Caudle v. Thomason*, 942 F. Supp. 635 (D.D.C. 1996), involved a defamation claim based on allegedly defamatory statements about a business brought by the individual CEO and president of the business. Turning back a motion to dismiss aimed at defamation's "of or concerning" element, the court reasoned that "[e]ven though the statements do not explicitly refer to Caudle, Caudle may prevail if a listener would reasonably believe that the statements referred to him." *Id.* at 638. Because Caudle was "closely associated" with the company, the court held that the complaint met the "of or concerning" element. *Id.* Similarly, because the plaintiff in the present case is the owner -- the only owner -- of the Hudson, Wisconsin greyhound facility, the alleged defamatory statement that the owner of that facility is connected to organized crime is plainly "of and concerning" the plaintiff.

It is thus not true, as petitioners state, that the court of appeals holding is a "complete departure from the accepted usual course of judicial proceedings in the District of Columbia." *Petition* at *i*.

Petitioners also assert that the court of appeals decision in this case is "contrary to the decisions of other circuits interpreting similar defamation laws." *Petition* at 6 n.2. Yet, not a single cited case supports the proposition that a victim must plead that he was identifiable by name in order to state a claim for defamation. For example, *Ruzicka v. The Conde Nast Pubs., Inc.*, 999 F.2d 1319 (8th Cir. 1993), is *not* a defamation or tort case at all. Rather, it is a contract case focusing on promissory estoppel in the context of a contract by which a magazine agreed not to identify an individual. Indeed, in contrasting the issues in that case with defamation "identity" issues, the court noted that whether a defamatory statement is of or concerning a plaintiff "is a question for the jury to be determined from the story as a whole." *Id.* at 1322. Insofar as *Ruzicka* is instructive on a matter of defamation law, it explicitly provides support for denying petitioners' motion to dismiss the complaint before the development of any evidence.

Similarly, petitioners' citation of *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3d Cir. 1998), does nothing but undermine the petitioners' own notion of the law. That case involved a letter Delta Airlines published to holders of stolen airline tickets. While the letter did not refer to specific travel agents, the court of appeals reversed a judgment on the pleadings because the ticket holders' knowledge of the agency at which they purchased the tickets could meet the "of or concerning" element. *Id.* at 190. Likewise, petitioners' reference to the owner of the Hudson greyhound racing facility, and the listeners' knowledge of the subject of the meeting, more than meets the element.

Petitioners also cite *Fetler v. Houghton Mifflin Co.*, 364 F.2d 650 (2d Cir. 1966). This case is part of the discrete

area of defamation law involving defamation by fiction, an issue not present in the instant case. This unremarkable opinion reverses summary judgment for the defendant on the ground that the similarity between a book's character and the plaintiff could permit a jury to find the requisite identification. *Id.* at 651.

Finally, *Golden North Airways v. Tanana Pub. Co.*, 218 F.2d 612 (9th Cir. 1955), also undermines petitioners' position. That case dealt with a newspaper editorial's alleged defamation of a particular class of air carriers. First, *Golden North* was a post-jury verdict case and not a sufficiency of the complaint case. Second, that opinion specifically addresses when an individual member of a group may sue personally over a defamatory statement about the group. The court specifically recognized that an *unnamed* individual member of a small group may sue when the group is defamed because the size of the group could lead a listener to attribute the statements to the individuals within the group. *Id.* at 318-19. This is not at issue in the instant case because the Hudson greyhound racing facility has only one owner: Croixland.

In sum, the petitioners -- after motion practice in the trial court, a full appeal, a motion for reconsideration with a suggestion for hearing en banc, a motion to stay the mandate in the court of appeals and, now, a petition for a writ of certiorari -- cannot proffer a single authority, within or without the District of Columbia, that supports the proposition that a defamation plaintiff must plead that the defamation made him identifiable "by name." Moreover, petitioners fail to recognize that the court of appeals found three independent reasons the allegations of Croixland's complaint met the "of or concerning" element, including that the Complaint alleges "that defamatory statements were made directly about

Croixland." (App. A8). Having declined to address these three independent grounds, petitioners have failed to create an issue for this Court's consideration.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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